

**Sample
Interview Questions
For Investigators**

Introduction

The following sample interview questions are presented in an effort to assist investigators propound questions to witnesses. These questions should serve as tools to help the investigator develop an interview around the emerging facts of the case, and should not replace other thoughtful and well-reasoned questions. These questions should not be submitted to the witness in writing unless the investigator follows up with a telephone or in-person interview.

The questions focus on seven subject areas:

1. **Disability**, focusing on whether an individual has a substantially limiting impairment, medical records, “working” as a major life activity, the essential functions of the job, reasonable accommodations, different treatment, and questions for management.

2. **Harassment/hostile working environment**, focusing on the applicable definitions and posing appropriate questions. Also provided is the purpose for which the particular question is posed, in an effort to have the investigator understand why the evidence is being elicited.

3. **Promotion**, 4. **Performance Evaluation (Ratings)**, 5. **Retaliation**, and 6. **Discipline**, all focusing on the law, and then on complainant’s prima facie case and pretext, followed by management’s legitimate, nondiscriminatory reason for the challenged actions with additional notes on the purpose of the questions; and

7. **Compensatory Damages**, focusing on the kind of damage, causation of the damage by the agency, the amount of the damage and the complainant’s responsibility to mitigate damages.

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SECTION 1: DISABILITY DISCRIMINATION

A. DEFINITIONS

Under the Rehabilitation Act of 1973, as amended, 29 U.S.C. §791 *et seq.*, and the Amendments to the Americans with Disabilities Act: it is unlawful for an agency to discriminate against an individual with a disability who is qualified to perform the essential functions of the job. See 29 C.F.R. §§ 1614.203(b); 1630.4. Additionally, an agency must make reasonable accommodation to the known physical or mental limitations of an employee who is a qualified individual with a disability, unless the agency can demonstrate that the accommodation would impose an undue hardship on the operation of its program.
29 C.F.R. § 1630.9.

An individual with a disability is one who:

1. Has a physical or mental impairment which substantially limits one or more of such person's major life activities;
2. Has a record of such an impairment, or
3. Is regarded as having such impairment.

29 C.F.R. § 1630.2(f)(1).

A physical impairment is, generally, any physiological disorder or condition, cosmetic disfigurement, anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organ, cardiovascular, reproductive, digestive, respiratory, genitourinary, hemic, lymphatic, skin, endocrine, immune and circulatory.

29 C.F.R. § 1630.2 (h)

A mental impairment is, generally, any mental, psychological or intellectual disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1630.2(h)

A **major life activity** means functions, such as caring for one's self, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, sitting, reaching, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, interacting with others, and working. Major bodily functions are included in this definition, such as functions of the immune system, special sense organs and skin, normal cell growth, digestive, genitourinary, bowel, bladder, neurological, brain, respiratory, circulatory, cardiovascular, endocrine, hemic, lymphatic, musculoskeletal, reproduction, and includes operations of an individual organ within a body system, such as the operation of kidney, liver or pancreas. *Whether something is a major life activity is not determined by reference to whether it is of "central importance to daily life."*

29 C.F.R. § 1630.2(i)

"Has a record of such impairment" means has a history of, or has been classified (or misclassified) as having a physical impairment that substantially limits one or more major life activities.

29 C.F.R. § 1630.2(k)

"Is regarded as having such an impairment" means has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; has a physical impairment that substantially limits major life activities only as a result of the attitude of a employer toward such an impairment; or has none of the impairments defined above, but is treated by an employer as having such an impairment.

29 C.F.R. § 1630.2(l)

"Substantially limits" is analyzed by rules of construction:

- i. Construe Broadly;
- ii. Compare individual to the condition, manner or duration under which the average person in the general population can perform that same major life activity. An impairment need not prevent, or significantly or severely restrict the individual from performing a major life activity;
- iii. Threshold issue of whether an impairment "substantially limits" a major life activity should not demand extensive analysis;
- iv. Make an individualized assessment;

- v. Comparison of an individual's performance of a major life activity to the performance of the same major life activity by most people in the general population will not require scientific, medical or statistical analysis;
- vi. Do not consider ameliorative effects of mitigating measures (except for ordinary eyeglasses or contact lenses);
- vii. An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active;
- viii. An impairment that substantially limits one major life activity need not substantially limit other major life activities;
- ix. The six-month "transitory" part of the transitory and minor exception to "regarded as" coverage does not apply in the definition of disability under the actual prong. The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section.

29 C.F.R. § 1630.2(j)(1).

Applying the rules of construction, or principles, set out above (i-ix), the individualized assessment of some types of impairments will almost always result in a determination of coverage under the actual or record of prong:

Deafness substantially limits major life activity of hearing;
 Blindness – seeing
 Intellectual disability – brain function;
 Partially or completely missing limbs, mobility impairments requiring use of wheelchair – musculoskeletal function
 Autism – brain function
 Cancer – cell growth
 Cerebral palsy – brain function
 Diabetes – endocrine function
 Epilepsy – neurological function
 HIV – immune function
 Multiple sclerosis – neurological function
 Muscular Dystrophy – neurological function
 Major Depressive disorder, Bipolar disorder, PTSD, Obsessive Compulsive disorder, schizophrenia – brain function

29 C.F.R. 1630.3(iii)

An **individual with a disability** is one who, with or without reasonable accommodation, is qualified to perform the **essential functions** of the position in question without endangering the health and safety of the individual or others and who depending upon the type of appointing authority being used,

- a. Meets the experience or education requirements (which may include passing a written test) of the position in question; or
- b. Meets the criteria for appointment under one of the special appointing authorities for individuals with disabilities.

29 C.F.R. § 1630.2(m)

Essential Functions means the fundamental job duties of the employment position the individual with a disability holds or desires. The term “essential functions” does not include the marginal functions of the position.

29 C.F.R. § 1630.2(n).

The term “**reasonable accommodation**” means (a) Modifications or adjustments to a job application a process that enable a qualified applicant with a disability to be considered for the position such qualified applicant desires; or (b) modifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable a qualified individual with a disability to perform the essential function of that position or (c) modifications or adjustments that enable a covered entity’s employee with a disability to enjoy equal benefits and privileges of employment as are enjoyed by its other similarly situated employees without disabilities.

Reasonable accommodation may include, but is not limited to : (a) Making existing facilities used by employees readily accessible to and usable by individuals with disabilities, (b) Job restructuring; part-time or modified work schedules; reassignment to a vacant position; acquisition or modifications of equipment or devices, appropriate adjustment or modifications of examinations, training materials, or policies; the provision of qualified readers or interpreters; and other similar accommodations for individuals with disabilities.

29 C.F.R. § 1630.2 (o).

“**Regarded As**” Coverage no longer requires a showing that an employer believed the impairment substantially limited a major life activity

Only two elements:

Employer took prohibited action
Because of an individual's actual or perceived impairment

But: Employer can defeat "regarded as" by showing that impairment was both transitory (< 6 months) and minor (as determined objectively)

Individuals not entitled to reasonable accommodation

29 C.F.R. § 1630.2(l)

Undue Hardship means, with respect to the provision of an accommodation, significant difficulty or expense incurred by a covered entity, when considered in light of **(a)** the nature and the cost of the accommodation needed under this part, taking into considerations the availability of tax credits and deductions, and/or outside funding; **(b)** the overall financial resources of the facility or facilities involved in the provision of the reasonable accommodation, the number of persons employed at such facility, and the effect on expenses and resources; **(c)** The overall financial resources of the covered entity, the overall size of the business of the covered entity with respect to the number of its employees, and the number, type and location of its facilities; **(d)** the type of operation or operations of the covered entity including the composition, structure and functions of the workforce of such entity, and the geographic separateness and administrative or fiscal relationship of the facility or facilities in questions to the covered entity; and **(e)** the impact of the accommodation upon the operation of the facility, including the impact on the ability of other employees to perform their duties and the impact on the facilities' ability to conduct business.

29 C.F.R. § 1630.2(p)

B. DOES A PERSON HAVE AN ADA DISABILITY?

Impairment: [Actual, Record of, Regarded as Prongs]

1. What is the medical condition(s) that you believe was the basis for the employer's alleged discrimination?
2. How long have you had this condition(s)?
3. Do you know how long your condition(s) is expected to last and how do you know?

3. If the condition(s) has been diagnosed by a health care professional, when and what was the diagnosis?
4. If you have ever been hospitalized for your condition, when and for how long?
5. If you regularly see a doctor or other health care professional because of your condition, what kind of doctor or health care professional do you see and how often do you see this professional?
6. What major life activity is involved? Give examples; ask how the impairment affects the major life activity in order to draw out the precise major life activity affected.

How does the impairment affect you, as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity. **Probe with:** what is the difficulty time or effort required to perform the major life activity; do you experience pain when performing the major life activity; what is the length of time a major life activity can be performed; how does the impairment affect the operation of a major bodily function; do you have any negative side-effects of medication, treatment [29 C.F.R. § 1630.4(ii)].

[Ask about potential major life activities from the list below, as many as may be appropriate for the condition. Ask follow-up questions to get more detail as necessary.]

Caring for oneself
 Performing Manual
 Tasks
 Seeing
 Hearing
 Eating
 Sleeping
 Walking
 Standing
 Sitting
 Reaching
 Lifting

Bending
 Speaking
 Breathing
 Learning
 Reading
 Concentrating
 Thinking
 Communicating
 Interacting with others
 Working

Major Bodily Functions
 functions of immune system,
 special sense organs and skin,
 normal cell growth,
 digestive, genitourinary, bowel
 bladder, neurological, brain,
 respiratory, circulatory,
 cardiovascular, endocrine,
 hemic, lymphatic, musculo-
 skeletal, reproduction, functions
 within a body system

Brushing your teeth, bathing, shaving, dressing, hair styling, household chores, grocery shopping, preparing meals, handling personal finances, using the computer **[relevant to caring for self and/or performing manual tasks]**

Other (e.g., bending, stooping, twisting, squatting, pushing, pulling, climbing, etc.)

[Combined limitations in these activities may amount to substantial limitation of a major life activity.]

7. In more detail, please describe each of the limitations you just identified.

How do these limitations affect (limit) you?

[Get numbers where applicable, e.g., how long, how far, how much]

If you experience limitations only under certain circumstances, what are those circumstances and how often do they occur?

8. Do you believe it is harder or requires more effort for you to do any activities than it is for the average person? **[Ask about potential major life activities from the list above, as many as may be appropriate for the condition, and ask follow-up questions for more details, as necessary.]**
10. From the time of the alleged discrimination, and working back in time to when you first got this condition(s), tell me exactly when and for how long you've experienced the limitations we've discussed.
11. Are there other people – such as family, friends, coworkers, supervisors, or healthcare professionals- who could tell us how your condition(s) causes problems with certain activities?
12. If other people help you with activities you have problems with, how often do they help and in what ways?
13. Did you notify your employer about this condition(s)? If so, when and where did this notification occur? Did you notify the employer on more than one occasion? If so, please describe.
14. What condition(s) did the employer know or believe you to have, and what do you think the employer believed you could not do because of this condition? **[Ask about potential major life activities from the list above, as many as may be appropriate for the condition.]** Why do you think this is?

C. MEDICAL RECORDS

1. Do you have any records that you can provide that identify or describe your condition (for example, medical records, doctor's notes, workers' compensation records, rehabilitation records, department of Veterans' Affairs documents, etc.)?
2. Do you have any records you can provide that indicate that your condition now limits you in any activities, or limited you in the past?
3. Has your employer been given any records or documents, including doctor's notes that discuss your condition, or any restrictions or limitations resulting from your condition?

[If yes]:

What records were given to your employer?

What did those records say and who were they from?

When did your employer receive these records?

4. We need you to sign a medical release so that we can get medical records about your condition from a third party, such as a doctor, to be able to show that you have a covered disability under the ADA. **[Obtain person's signature on the medical release]**

D. "WORKING" AS A MAJOR LIFE ACTIVITY

[Only if it appears that the person is/was not substantially limited in any of the above listed potential major life activities, or you are unsure about this, ask the additional interview questions that deal solely with "working" as a major life activity.]

1. If you have ever been unable to work at all due to your condition(s) or treatment for your condition(s), when, for how long and why were you unable to work?
2. Have there been any jobs or job duties that you believe you couldn't do because of your condition(s) or treatment for your condition? Please describe.

[If yes]:

How does or did you condition(s) interfere with doing these jobs or job duties?

When and for how long have you been unable to do these jobs or job duties?

To what extent are these jobs available in the area where you live?

Do you have the training, knowledge, skills, abilities, and education needed to do these types of jobs? Please describe.

Have you ever done these types of jobs? **[Ask follow-up questions to get more detail, as necessary.]**

3. Do you have any medical records that you can provide that bear on your ability to work, or that show that there are any jobs or job duties that you can't do or are limited in doing because of your condition?
4. Did the employer say or do anything to indicate that it is believed you could not do a job because of your condition(s)? **[Ask follow up questions to get more details as necessary.]**

[If the answer to the above question is yes]:

Did the employer offer or refuse you a different job and if so what job?

Please give me your work history, including the types of jobs you've held in the past.

Please tell me about your education, including any degrees, certificates, licenses, or vocational training you may have.

E. WHAT ARE THE ESSENTIAL FUNCTIONS OF THE JOB?

1. Are/were you able to perform the essential functions of your job?
2. Can you describe the essential functions of your job?
3. Are there any job functions you cannot/could not perform?
4. Is there an accommodation that will allow you to perform the essential functions of your job? If so, please describe.

**F. HAS THE AGENCY PROVIDED REASONABLE ACCOMMODATION?
[Not applicable in 3d prong (regarded as) analysis]**

1. Have you asked your employer for a reasonable accommodation? If so, when?
2. Did your employer respond to your request for reasonable accommodation? When did the employer respond, and what was the response?
3. If an accommodation was provided, was the workplace barrier that prevented you from performing the essential functions of your position removed? Please describe.
4. Is the workplace barrier still in place? Please describe.

G. WAS COMPLAINANT TREATED DIFFERENTLY FROM SIMILARLY SITUATED EMPLOYEES?

1. Do you believe that you are treated differently than are other employees? If so, with whom do you compare yourself? Do you know if these employees are disabled? How do you know this?
2. Please identify specific events of different treatment, describing in detail, by whom, how and when you were treated differently.

H. QUESTIONS FOR MANAGEMENT

1. Do you know if the complainant has an impairment? If yes, how do you know this, and when did you become aware? Please describe in detail.
2. Do you know if the complainant has a record of impairment? If yes, how do you know this, and when did you become aware? Please describe in detail.
3. In your view, do you suspect the complainant has impairment? If yes or no, please describe in detail.
4. In your view, what is the effect of the complainant's impairment on his/her ability to perform daily life activities?

5. Has the complainant asked you for an accommodation of his/her impairment? Please describe in detail when and how the complainant made this request(s) and what you did in response.
6. If the complainant asked you for an accommodation, did you consult anyone else in management about providing the accommodation? Please describe your consultation in detail.

Note: follow up here with an interview of the person consulted, to test the manager's description of the consultation

7. Did you provide the requested accommodation? If yes, when did you provide it? If no, please describe in detail your reasons for not providing the accommodations.
8. The complainant asserts that you treated him/her differently from XX when...Please provide a detailed explanation of your treatment of complainant and XX. Do you know if XX has a disability or is impaired?
9. If a manager presents any of the defenses contemplated in 29 C.F.R. § 1630.15, review that regulation and ask specific questions, such as those focusing on direct threat: Where a manager asserts that an individual poses a direct threat to the health or safety of the individual or others, ask what steps a manager took to satisfy the burden to conduct a n individualized assessment of the risk posed by complainant. See 29 C.F.R. § 1630.29(r) and Appendix for standards.

I. DIRECT THREAT

An employer may require, as a qualification standard, that an individual not pose a direct threat to the health or safety of him/herself or others. 29 C.F.R. § 1630.2(r). An employer is not permitted to deny an employment opportunity to an individual with a disability merely because of a *slightly* increased risk; the risk can only be considered when it poses a *significant* risk, i.e., *high probability of substantial harm*. *Id.* A speculative or remote risk is insufficient. *Id.* The burden is on the employer to demonstrate that a significant risk exists, and the employer's finding must be based on an individualized assessment that takes into account (a) the duration of the risk, (b) the nature and severity of the potential harm, (c) the likelihood that the potential harm will occur, and (d) the imminence of the potential harm. *Id.*: Spencer v. DHS, EEOC Request to Reopen No. 05A30898 (August 29, 2005).

1. What is the duration of the risk?

2. What is the nature and severity of the potential harm?
3. What is the likelihood that the potential harm will occur?
4. What is the imminence of the potential harm?
5. How do complainant's actual skills and abilities measure against the essential functions of the job?

Complainant's evidence
Agency's evidence

J. UNDUE HARDSHIP

1. What is the impact of the accommodation upon the operation of the facility?
2. What is the impact on the ability of other employees to perform their duties, and the impact on the facility's ability to conduct your business?

SECTION 2: HARASSMENT/HOSTILE WORK ENVIRONMENT

Harassment of an employee that would not occur but for the employee's race, color, sex, national origin, age, disability, or religion is unlawful, if it is sufficiently patterned or pervasive. *Hurston v. United State Postal Service*, Appeal No. 01986458 (January 19, 2001) citing *Wibstad v. United States Postal Service*, EEOC Appeal No. 01972699 (August 14, 1998). To establish a prima facie case of hostile environment harassment, a complainant must show that: (1) he belongs to a statutorily protected class; (2) he was subjected to harassment in the form of unwelcome verbal or physical conduct involving the protected class; (3) the harassment complained of was based on the statutorily protected class; and (4) the harassment affected a term or condition of employment and/or had the purpose or effect of unreasonably interfering with the work environment and/or creating an intimidating, hostile, or offensive work environment, 29 C.F.R. § 1604.11.

Reference: *EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors* (June, 1999) at EEOC.gov.

A. DEFINITIONS

Harassment in violation of Title VII, the ADEA and the Rehabilitation Act is any unwelcome verbal or physical conduct based on one or more of the protected bases that is objectively offensive that it alters the conditions of the victim's employment. This standard is met when:

The conduct culminates in a tangible employment action or

The conduct was sufficiently severe or pervasive to create a hostile work environment.

Who can commit workplace harassment?

Management Official

Co-worker

Non-employee

Elements of Harassment Claim

Conduct must be unwelcome

Conduct based on protected basis

Conduct results in tangible employment action or creates hostile work environment

Unwelcome Conduct:

Occurs when employee did not solicit or invite the conduct and regarded it as undesirable

Critical Inquiry: did complainant communicate that the conduct was unwelcome?

Submission does not mean the conduct was welcome

Active participation may defeat the claim

Tangible Employment Action:

Where supervisor's illegal harassment results in a significant change in employment status or benefits (e.g., demotion, terminations, failure to promote, etc.)

Only individuals with supervisory or managerial responsibility (e.g., supervisor, team leader) can commit this type of harassment

If a tangible employment action results from illegal harassment by a supervisor, the agency is automatically liable – no affirmative defenses attach

Hostile Environment Harassment

Anyone can commit – manager, coworker, non-employee

Unwelcome comments or conduct

Based on protected basis which “unreasonably interferes with employee’s work performance” or “creates intimidating, hostile, or offensive work environment

Key Issues:

Frequency and severity
Reasonable Person Standard
Tangible effect on individual's job not necessary
Psychological harm not necessary

Reasonable person:

Is conduct severe or pervasive enough to create environment that a reasonable person would find hostile, intimidating or abusive

And

Does the employee perceive the conduct as hostile, intimidating, or abusive?

Agency Liability: Hostile Work Environment

Harassment by Management Official

Agency liable even if management did not know, unless both prongs of affirmative defense are met

Agency exercised reasonable care to prevent and promptly correct harassment and

Employee unreasonably failed to take advantage of any preventative or corrective opportunities offered by the agency or to avoid harm otherwise

Coworker/non-employee Harassment

Agency is liable if it knew or should have known of the harassment and failed to take immediate and appropriate corrective action

Agency knowledge is assumed

if the victim complains about the harassment *or*

the conduct occurred in the presence of a supervisor *or*

the conduct was widespread

B. QUESTIONS FOR THE COMPLAINANT

1. Identify specific events and dates which comprise the harassment/hostile environment. For each event, identify who, what, when, where, and how: *Who* committed the alleged harassment? *What* exactly occurred or what was said? *When* did it occur and is it still ongoing? *Where* did it occur? *How* often did it occur? *How* did it affect you?

Purpose: to elicit complainant's facts

How did you react?

What response did you make when the incident(s) occurred or afterwards?

2. How did the harassment affect you? Has your job been affected in any way?

Purpose: to examine whether there was tangible employment action; to examine the impact

3. Did others witness these events? Who, how, what events were witnessed and on what dates were these events witnessed?

4. Did you tell anyone about the harassment?

5. Who did you tell, when, and what did you tell the person?

Purpose: to elicit complainant's facts

6. Did the person who harassed you harass anyone else? Do you know whether anyone complained about harassment by that person?

Purpose: Affirmative Defense: 1st Prong: Employer must take reasonable care to prevent and promptly correct harassment; to test quality of evidence

7. Are there any notes, physical evidence, or other documentation regarding the incident(s)?

Purpose: to test if the event occurred

8. Did you complain or make known your rejection of the alleged discriminatory conduct? Who did you tell, when, what did you tell the person?

Purpose: goes to issue of unwelcomeness

9. Are you aware of the agency's anti-harassment policy? How are you aware? Did you complain pursuant to that policy?

Purpose: Affirmative Defense, 2nd Prong: Employee's duty to exercise reasonable care to minimize the damages that result from violations of the statute.

10. Did you complain about the harassment/hostile work environment? Who did you tell, when, and what did you tell the person?

Purpose: Affirmative Defense, 2nd Prong: Employee's duty to exercise reasonable care to minimize the damages that result from violations of the statute; to test whether agency knew or should have known of the harassment and failed to take immediate and appropriate corrective action

11. What happened as a result of your complaint? Did the harassment/hostile work environment stop? When did it stop? Promptly?

Purpose: Affirmative Defense, 1st Prong: Employer must take reasonable care to prevent and promptly correct harassment; to test agency's burden to take immediate and appropriate corrective action.

12. Did you take any action to avoid further harm by the perpetrator?

Purpose: Affirmative Defense, 2nd Prong: Employee's duty to exercise reasonable care

13. How would you like to see the situation resolved?

Purpose: Remedy or ADR

14. Do you have any other relevant information?

C. QUESTIONS FOR ALLEGED HARASSER

1. What is your title/role in the organization? What is your work relationship with the complainant?
2. Recite events and dates claimed by complainant as harassment/hostile work environment. Ask perpetrator for his/her response: record details of events and dates as recited by alleged Harasser.
3. Did the complainant notify you that the conduct was unwelcome? What form did this notification take? What did the complainant say or write to you?

Purpose: to ascertain/clarify complainant's facts re: unwelcomeness

4. What was your reaction? What did you do?

Purpose: Affirmative Defense, 1st Prong: Employer must take reasonable care to prevent and promptly correct harassment; to test complainant's facts

5. If alleged harasser asserts that the complainant's claims are false, ask why complainant might lie. Ask alleged harasser for his/her explanation of events.

Purpose: Employer must take reasonable care to prevent and promptly correct harassment; to test complainant's facts

6. Are there any persons who have relevant information?

Purpose: to ascertain/clarify complainant's/alleged harasser's facts

7. Do you know of any other relevant information?

Purpose: to ascertain/clarify complainant's/alleged harasser's facts

8. Are there any notes, physical evidence or other documentation regarding the incidents?

Purpose: to ascertain/clarify complainant's/alleged harasser's facts

D. QUESTIONS FOR WITNESSES

1. Recite events and dates claimed by the complainant as harassment/hostile work environment. Ask witnesses to recite details of events and dates.
What did you see or hear?
When did this occur?
Describe the alleged Harasser's behavior toward the complainant and toward others in the workplace.

Purpose: to ascertain/clarify complainant's/alleged harasser's facts

2. Does witness know if complainant told alleged harasser that conduct was unwelcome? How does witness know? Recite dates, details of observable events, conversations

Purpose: to ascertain/clarify complainant's/alleged harasser's facts; goes to issue of unwelcomeness

3. Did witness and complainant discuss the harassment/hostile work environment? When/what was substance of conversation? Did you observe any actions by the complainant regarding harassment? If so, what, where, when did you observe?

Purpose: to ascertain/clarify complainant's facts

4. Do you know of any other relevant information?
5. Are there other persons who have relevant information?

E. QUESTIONS FOR RESPONSIBLE OFFICIAL IN COMPLAINANT'S CHAIN OF COMMAND/IN AGENCY'S ANTI-HARASSMENT CHAIN

1. How/when did you become aware that complainant complained of harassment/hostile work environment?

Purpose: Note and Affirmative Defense, 2nd Prong: Employee's duty to exercise reasonable care

2. What actions did you take once you became aware of the harassment/hostile work environment complaint? Provide events and dates.

Purpose: Affirmative Defense, 1st Prong: Employer must take reasonable care to prevent and promptly correct harassment; to test agency's burden to take immediate and appropriate corrective action.

3. Did you offer any preventive or corrective action?

Purpose: Affirmative Defense, 1st Prong: Employer must take reasonable care to prevent and promptly correct harassment; to test agency's burden to take immediate and appropriate corrective action.

4. Do you know if complainant took advantage of this offer?

Purpose: Affirmative Defense, 2nd Prong: Employee's duty to exercise reasonable care

5. Are you aware of any previous complaints against this alleged harasser? If so, what actions did the agency take in response to the complaint(s)?

Purpose: Affirmative Defense, 1st Prong: Employer must take reasonable care to prevent and promptly correct harassment; to test agency's burden to take immediate and appropriate corrective action.

6. Where is the agency's anti-harassment policy posted? How/when is it disseminated to staff?

Purpose: Affirmative Defense, 1st Prong: Employer must take reasonable care to prevent and promptly correct harassment

SECTION 3: PROMOTION

A. PRIMA FACIE CASE

Where non-selection or non-promotion is at issue, complainant may establish a prima facie case of discrimination with a showing (1) s/he is a member of a protected group, (2) s/he applied for a position for which s/he was qualified, (3) s/he was not selected and (4) the employer continued to seek applications from other candidates or selected another candidate. *Silver v. United States Postal Service*, EEOC Request No. 05931164 (May 12, 1994); *Keyes v. Secretary of the Navy*, 853 F.2d 1016, 1023 (1st Cir. 1988); *Burchfield v. Department of the Treasury*, EEOC Appeal No. 01970152 (April 6, 2000).

B. QUESTIONS FOR THE COMPLAINANT

1. When/how did you submit your application?

Purpose: to establish 2nd Prong of Prima Facie Case

2. When/how did person /committee interview you?

Who/protected class characteristics, conducted interview?

What questions were asked during the interview?

Recite your answers to the interview questions

How long did the interview last?

Identify any discriminatory events/remarks which occurred during the interview.

3. Why do you conclude these events were discriminatory?

Purpose: to establish facts

4. How/when did you learn of your non-selection?

Purpose: to establish facts

5. Why are you better qualified than the selectee?

Purpose: to establish pretext

6. What about your qualifications are observably superior to those of the selectee?

Purpose: to establish pretext

7. What are the protected class characteristics of the selectee?

Purpose: While the selectee does not have to outside of the complainant's protected class in order for the complainant to establish a prima facie case, evidence of the selectee's protected class characteristics may be relevant to the complainant's claim or to management's legitimate, nondiscriminatory reason.

8. What events/remarks prove discrimination by the selecting official/responsible management official?

Purpose: to establish pretext

9. Question to be posed following investigator's recitation to complainant of management's legitimate, non-discriminatory reason: Now that you are aware of management's reason for making the selection decision, what is your response to this reason? Do you believe this reason is true or false? Please explain in detail.

C. QUESTIONS FOR THE SELECTING OFFICIALS/RESPONSIBLE MANAGEMENT OFFICIALS

1. What role did you play in the selection process, and when and how did you become involved?

Purpose: to establish facts

2. What qualifications did you seek in the successful candidate?

Purpose: to establish facts; to test agency's legitimate, non-discriminatory reason; to test complainant's evidence of pretext

3. How would these qualifications indicate success in performing the job duties?

Purpose: to establish facts; to test agency's legitimate, non-discriminatory reason; to test complainant's evidence of pretext

4. What qualifications did the successful candidate have?

Purpose: to establish facts; to test agency's legitimate, non-discriminatory reason; to test complainant's evidence of pretext

5. What qualifications did the complainant have/lack?

Purpose: to establish facts; to test agency's legitimate, non-discriminatory reason; to test complainant's evidence of pretext

6. Why did you choose the successful candidate?

Purpose: to establish facts; to test agency's legitimate, non-discriminatory reason; to test complainant's evidence of pretext

7. Why did you not choose the complainant?

Purpose: to establish facts; to test agency's legitimate, non-discriminatory reason; to test complainant's evidence of pretext

SECTION 4: PERFORMANCE EVALUATION

A. PRIMA FACIE CASE

To prevail in a performance rating disparate treatment claim, complainant must satisfy the three-part evidentiary scheme fashioned by the Supreme Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). S/he must initially establish a prima facie case by demonstrating that s/he was subjected to an adverse employment action under circumstances that would support an inference of discrimination. *Furnco Construction Co. v. Waters*, 438 U.S. 567, 576 (1978). The burden then shifts to the agency to articulate a legitimate, non-discriminatory reason for its actions. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981). To ultimately prevail, complainant must prove, by a preponderance of evidence, that the agency's explanation is pretextual. *Reeves v. Sanderson Plumbing Products, Inc.* 530 U.S. 133, 143 (2000); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 519 (1993); *Pavelka v. Department of the Navy*, EEOC Request No. 05950351 (December 4, 1995). Proof of a prima facie case will vary depending upon the facts of the particular case. *McDonnell Douglas Corp.* 411 U.S. at 804 n.14. While it would be helpful for complainant to show that s/he was treated differently than comparative employees outside of his/her protected group, the lack of such a showing would not necessarily be fatal to the establishment of a prima facie case. *Connor v. Consolidated Coin Caters Corp.* 517 U.S. 308, 312-13 (1996); *Carson v. Bethlehem Steel Corp.* 82 F.3d 157 159 (7th Circ. 1996); *Winston v. Department of Health & Human Services*, EEOC Appeal No. 01985752 (December 13, 2000)

B. QUESTIONS FOR THE COMPLAINANT

1. Explain why your performance is better than the rating your supervisor gave you. Detail specific events and dates when performance events occurred which demonstrate your better performance.

Purpose: to test complainant's and supervisor's explanations of events

2. What about your performance is different from/better than last year's performance? Detail specific events and dates when these events occurred, to demonstrate the difference in performance from last year to this year.

Purpose: to test complainant's and the supervisor's explanations of events

3. Why is your performance better than that of your co-workers? What were you able to observe about your co-worker's performance that is different from yours? Identify your co-worker's race, sex, national origin, etc.

Purpose: to test complainant's and the supervisor's explanation of events; to test complainant's ability to meet a prima facie case

4. How are you similarly situated to your co-workers whose performance you are comparing?

Purpose: to test the complainant's ability to meet a prima facie case

5. What evidence shows your supervisor was motivated by your [race, sex, national origin, etc.] to give you a rating you didn't deserve?

Purpose: to test complainant's theory of the case

6. How did your performance impact the mission of the organization?

Purpose: to test the complainant's and the supervisor's explanations of events

7. How did the performance of your similarly situated co-workers impact the mission of the organization?

Purpose: to test the complainant's and the supervisor's explanations of events; to test the complainant's ability to meet a prima facie case

8. Rebuttal: Respond to reasons given by rating official

Purpose: to establish pretext

C. QUESTIONS FOR RATING OFFICIAL

1. Provide specific reasons to support your rating.

Failure to inform of status of cases: how did you notify complainant s/he should inform you of status; how did you expect complainant to notify you of status; what specific events evidence complainant's failure to inform you of status?

Failure to complete work on time: how did you notify complainant of time requirements; what specific events evidence complainant's failure to complete work on time;

Failure to complete work thoroughly or with adequate quality: what standards did you communicate to complainant about appropriate/inappropriate quality; what specific events evidence complainant's inferior quality/inability to be thorough/inattention to detail, etc.

Purpose: to test complainant's and the supervisor's explanations of events

2. Which of your subordinate employees do you believe are similarly situated to the complainant, and explain how they are similarly situated.

Purpose: to test complainant's ability to meet a prima facie case

3. Please provide ratings for similarly situated subordinate employees. Please provide specific evidence to support your rating of the subordinate employee.

Purpose: to test the complainant's and supervisor's explanations of events; to test the complainant's and supervisor's explanations of events; to test complainant's ability to meet a prima facie case

4. How did complainant's performance impact the mission of the organization?
How did the performance of similarly situated subordinates impact the mission of the organization?

Purpose: to test the complainant's and the supervisor's explanations of events

D. QUESTIONS FOR THE APPROVING OFFICIAL

1. What is your direct/indirect knowledge of the complainant's performance?
Please describe in detail your participant in the complainant's rating.

Purpose: to test the complainant's and the supervisor's explanations of events

2. What is your direct/indirect knowledge of the performance of the complainant's similarly situated co-workers? Please describe in detail your participation in the ratings of these other employees.

Purpose: to test the complainant's and the supervisor's explanations of events; to test complainant's ability to meet a prima facie case

3. How did the complainant's performance/the performance of the complainant's similarly situated co-workers impact the mission of the organization?

Purpose: to test the complainant's and the supervisor's explanations of events

SECTION 5: RETALIATION

A. PRIMA FACIE CASE

A complainant can establish a prima facie case of reprisal discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. *Shapiro v. Soc. Sec. Admin.*, EEOC Request No. 05960403 (Dec. 6, 1996) (citing *McDonnell Douglas*, 411 U.S. at 802). Specifically, in a reprisal claim, and in accordance with the burdens set forth in *McDonnell Douglas* and *Coffman v. Dep't of Veterans Affairs*, EEOC Request No. 05960473 (Nov. 20, 1997), Complainant may establish a prima facie case of reprisal by showing that: (1) she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, she was subjected to adverse treatment by the agency; and (4) a nexus exists between the protected activity and the adverse treatment. *Whitmire v. Dep't of the Air Force*, EEOC Appeal No. 01A00340 (Sept. 25, 2000). A nexus may be shown by evidence that the adverse treatment followed the protected activity within such a period of time and in such a manner that a reprisal motive is inferred. See *Clay v. Dep't of the Treasury*, EEOC Appeal No. 01A35231 (Jan. 25, 2005).

The Commission has stated that adverse actions need not qualify as “ultimate employment actions” or materially affect the terms and conditions of employment to constitute retaliation. *EEOC Compliance Manual Section 8: Retaliation*. No. 915.003, at 8-15 (May 20, 1998); see *Burlington N. and Santa Fe Ry. Co. v. White*. 548 U.S. 53 (2006) (finding that the anti-retaliation provision protects individuals from a retaliatory action that a reasonable person would have found “materially adverse,” which in the retaliation context means that the action might have deterred a reasonable person from opposing discrimination or participating in the EEO process).

It is important to emphasize that it is causation, not temporal proximity alone between the knowledge of the protected activity and the adverse action, that is an element of Complainant's prima facie case. *Baker v. USPS*, EEOC Appeal No. 0120112242 (Mar. 7, 2012), citing *Kachmar v. Sunguard Data Systems*, 109 F.3d 173. 178 (3d Cir. 1997). “Temporal proximity merely provides an evidentiary basis from which an inference can be drawn. The element of causation, which necessarily involves an inquiry into the motives of an employer, is highly context-specific.” *Baker v. USPS*, EEOC Appeal No. 0120112242. In general, Complainant can demonstrate a causal connection using temporal proximity when the separation between the employer's knowledge of the protected activity and the adverse action is very close. See *Clark County School District v. Breeden*, 532 U.S. 268 (2001) (holding that a three-month period was not proximate enough to establish a causal nexus); *Hancock v. USPS*, 0120090219 (Oct. 22, 2010).

B. QUESTIONS FOR THE COMPLAINANT

1. Describe the earlier activity which now causes you to believe that the current event was motivated by retaliation. When did the earlier event occur?

Purpose: To establish the 1st Prong of the prima facie case

2. At the time of the event which is the basis of this complaint, was the responsible management official aware of the earlier protected activity? What facts tell you that the responsible management official was aware of the earlier protected activity at the time of the event which is the basis of this complaint?

Purpose: To establish the 2nd Prong of the prima facie case

3. What event occurred which caused you to bring this complaint?

Purpose: to establish the 3rd Prong of the prima facie case

4. Why was the responsible management official motivated to retaliate against you? What facts do you have to support this?

Purpose: to test the complainant's theory of the case

C. QUESTIONS FOR THE RESONSIBLE MANAGEMENT OFFICIAL

1. Were you aware that the complainant had participated in a protected EEO activity?

Purpose: To test Element 2 of the prima facie case

2. How/when did you first become aware of complainant's previous EEO activity?

Purpose: To test Element 2 of the prima facie case

3. What motivated you to take the actions which form the basis of this complaint?

Purpose: to test complainant's theory of the case

4. If there are comparators involved in this claim, did you know if they participated in EEO activity? When did you become aware of their participation?

Purpose: to test the evidence of whether it was more/less likely that the RMO retaliated against those who participated in EEO activity.

SECTION 6: DISCIPLINARY ACTION

A. PRIMA FACIE CASE

An individual alleging that a disciplinary action was taken for discriminatory reasons can establish a prima facie case of discrimination by showing that those outside his/her protected class engaged in similar misconduct, and that the agency treated others more favorably than the complainant, i.e., imposed less severe discipline or did not discipline at all. *Rampersad v. Department of the Air Force*, EEOC Appeal No. 01943524 (March 7, 1996).

B. QUESTIONS FOR THE COMPLAINANT

1. Please describe in detail the events that form the basis for this complaint.

Purpose: to establish facts

2. Please describe in detail why you believe the responsible management official is motivated to discriminate against you because of your race, sex, national origin, etc.

Purpose: to establish the complainant's view of the manager's motivations

3. Are you aware of others who have been disciplined? Do you know of others who conduct was the same as yours, but who were not disciplined, or who were disciplined less harshly? If so, please identify these other individuals (name, work unit, supervisor, race, sex, national origin, etc.)

Purpose: to establish the complainant's evidence that s/he was treated differently than similarly situated co-workers.

4. Please describe in detail what you know about the offenses of others.

Purpose: to establish the complainant's evidence that s/he was treated differently than similarly situated coworkers.

5. Please describe in detail how the offenses of others are similar to the events which form the basis of this complaint.

Purpose: to establish the complainant's evidence that s/he was treated differently than similarly situated co-workers.

6. Please describe in detail what about the discipline that was meted out to similarly situated colleague was like/different from the discipline meted out to you.

Purpose: to establish the complainant's evidence that s/he was treated differently than similarly situated co-workers.

7. Do you believe the discipline was justified? Please explain.

Purpose: to establish the prima facie case and to show pretext

C. QUESTIONS FOR THE SUPERVISOR/DISCIPLINARIAN

1. Please describe in detail the events which led you to discipline the complainant.

Purpose: to establish the facts as recited by the supervisor/disciplinarian

2. Have you disciplined any other employees? If so, please identify the employee by name and identify the race, sex, national origin, etc., if known, and please identify the offense committed and penalty issued to the employee

Purpose: to establish the supervisor/disciplinarian's history of even/uneven discipline of employees.

3. Are you aware of others who have behaved as did the complainant? If so, did you supervise these individuals? Please identify the employee by name and identify the race, sex, national origin, etc. if known, and please identify the offense committed and penalty issued to the employee.

Purpose: to establish the supervisor/disciplinarian's history of even/uneven discipline of employees

4. Did you consult with any other management officials when deciding whether to discipline the complainant? If so, whom did you consult, when and how did this consultation occur, and what was the substance of the consultation?

Purpose: to establish the supervisor/disciplinarian's objectivity

5. Did you consult with other management officials when deciding whether to discipline other employees? If so, whom did you consult, when, and how did this consultation occur, and what was the substance of the consultation?

Purpose: to establish the supervisor/disciplinarian's objectivity and history of even/uneven discipline of employees

6. What advice did other management officials provide to you regarding the discipline of the complainant or other employees?

Purpose: to establish the supervisor/disciplinarian's objectivity

7. Did you act on the advice provided by other management officials? If so, how?

Purpose: to establish the supervisor/disciplinarian's objectivity

8. Why/how did you choose the punishment you meted out to the complainant and other employees?

Purpose: to establish the supervisor/disciplinarian's objectivity and history of even/uneven discipline of employees

9. Did you consider the complainant's post-disciplinary record when meting out the discipline involved here? Please describe in detail.

Purpose: to establish the supervisor/disciplinarian's objectivity

D. QUESTIONS FOR OTHER MANAGEMENT OFFICIALS

1. Did the supervisor consult with you regarding discipline for the complainant? If so, when and how did this consultation occur, and what was the substance of the consultation?

Purpose: to establish the supervisor's objectivity

2. Did the supervisor consult with you regarding discipline for other employees? If so, when and how did this consultation occur, and what was the substance of the consultation?

Purpose: to establish the supervisor's objectivity and history of even/uneven discipline of employees

3. What advice/recommendation did you provide to the supervisor, and why did you provide this specific advice?

Purpose: to establish the supervisor's objectivity

4. Do you have any reason to suspect that the supervisor would discriminate/retaliate against the complainant? Please provide a detailed explanation whether the answer is yes or no.

Purpose: to establish the supervisor's motivation in disciplining the complainant.

E. QUESTIONS FOR OTHER WITNESSES

1. Please identify your race, sex, national origin, etc.
2. What do you know about the disciplinary action or the event giving rise to it?
3. Is your knowledge a first-hand observation, or did you learn about this from another source? Please describe in detail.

SECTION 7: COMPENSATORY DAMAGES

A. KIND

1. Have you sustained any physical or mental injury as a result of actions taken by the Agency?
2. Describe the injuries you have sustained.
3. What kind of manifestations of emotional distress have you exhibited?
Examples: weight loss or gain
Insomnia
Heart palpitations
Headaches
Stomach Problems
Difficulty Concentrating
Irritability
Panic/Anxiety Attacks
Depression
Crying
4. Describe in detail the emotional distress, stress, anxiety, etc. Have you sought medical attention? Provide dates of treatment for each healthcare provider and the type of treatment received. Please produce any supporting documents as proof of your treatment.
5. Are you currently taking any medication(s) for the injury allegedly caused by the agency? What is the name of the medication(s)? How long have you been taking it? What is the dosage? Do you have any side effects of any of these medications?
6. Were you hospitalized because of the injury allegedly caused by the agency? When? What was the diagnosis on admission? For how long were you hospitalized? What types of tests were done in the hospital? What was the diagnosis on release? What were the instructions on release? Please produce any supporting documentation of your hospitalization.

7. Have you recovered from the injury? If not, what is your current condition? When are you expected to recover? Please produce any supporting documentation for diagnoses/prognoses.
8. Do you have any medical documents which describe the injury/illness/condition? If so, please produce.

B. CAUSATION

1. What did the agency do to cause your injury? How did these actions cause your injury? How is the injury related to the agency's actions?
2. Has any healthcare provider told you that your injury was caused by the agency's actions? Please identify the healthcare professional. When was this told to you? Please describe what was told to you. What was the basis for this opinion? Please produce any supporting documents.
3. Have you ever been treated by this healthcare professional before? When? For what were you treated? What was the diagnosis? Were you prescribed medications? How long have you known this doctor? Please produce any documents regarding this treatment.
4. Have you ever had this condition before? When? For how long? What was it caused by? Who treated you for it? Were you given medication? Please produce any documents regarding this condition.
5. Have you ever had treatment for any psychological problem? When? By whom? What was the diagnosis? Were you given medication? For how long? Please produce any documentation regarding this treatment.
6. Have you ever been hospitalized prior to the hospitalization discussed in response to the prior questions? When? Why? Please produce any documents regarding this hospitalization.

7. During the period of time (give dates) were there: Any deaths in your family? Marital or family problems? Financial problems? Serious illness in family? Auto accidents? Any other non-job factors contributing to emotional distress?
8. Have you ever been unemployed before? When? Why? For how long?

C. AMOUNT

1. With respect to your claims of injury/illness/condition, state specifically the cost of treatment (Get itemized bills, etc.).
2. Are you making a claim for medical expenses as part of the complaint?
3. Are you still receiving medical or psychological treatment?
4. Do you anticipate further treatment? On what basis do you anticipate? For how long? What type of treatment? What is the expense of further treatment?
5. What is your medical/psychological condition presently? Please produce documents which describe your present condition.
6. During the period of time (give dates), how much sick/annual leave did you use? What is your current leave balance? LWOP? AWOL?
7. Have you incurred expenses in traveling to obtain medical treatment? Please describe in detail and produce supporting documents.
8. Other than the loss of wages, are you claiming any other financial losses? Loss of credit? Loss of property, i.e., car or home? Child care? Loss of Professional reputation?
9. Has your earning capacity been impaired due to the agency's actions? How?

D. MITIGATION

1. Have you filed any claims for workers' compensation benefits since (date)? When? What was the nature of the claim? What was the amount received on the claim? Are you still receiving compensation? If declined, when? What was the reason for OWCP not accepting your claim? Please produce supporting documents.
2. Have you filed a claim for disability retirement since (date), based on the injury allegedly caused by the agency? When? Was the claim approved? What was the amount received on the claim? Who assisted you in filing the claim? Please produce a copy of your disability retirement application.
3. Have you claimed any other benefits since (date)? Please describe.

E. WITNESSES

1. Names, addresses
2. Do these witnesses have first-hand information about your damages?
3. How did the witnesses come about their information?
4. What information can these witnesses provide?